

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOURNE CO.,)
)
 Plaintiff,)
)
 -against-)
)
 TWENTIETH CENTURY FOX FILM CORPORATION,)
 FOX BROADCASTING COMPANY, TWENTIETH)
 CENTURY FOX TELEVISION, INC., TWENTIETH)
 CENTURY FOX HOME ENTERTAINMENT, INC.,)
 FUZZY DOOR PRODUCTIONS, INC., THE)
 CARTOON NETWORK, INC., SETH MACFARLANE,)
 and WALTER MURPHY,)
)
 Defendants.)
)
 Case No. 07 Civ. 8580 (DAB))
)

Deposition of JEREMIAH HORAN, pursuant to Rule 30(b)(6) Notice, held at the offices of Loeb & Loeb, 345 Park Avenue, New York, New York, on Friday, February 29, 2008, commencing at 9:57 a.m., before James W. Johnson, Registered Professional Reporter and a Notary Public of the State of New York.

1 Horan

2 Q. Did you talk to anyone who personally
 3 had knowledge of a request having been made?
 4 A. I have to answer that by saying that I
 5 spoke to anyone who might possibly have any
 6 knowledge of it and found that no one did have any
 7 recollection.

8 Q. Is it fair to say, then, that you don't
 9 know what the request was?

10 MR. FAKLER: Objection to form.

11 Q. If a request was made you don't know
 12 what the request was?

13 A. At the time we were looking I did not
 14 know. Since then I have seen the interoffice memo
 15 that was presented from, that was circulated at
 16 Fox. It says it was denied.

17 Q. Well, other than any knowledge you may
 18 have from that memo, of what that memo says, do you
 19 know specifically what the request was, what type
 20 of use was requested?

21 A. Since we had no record of the request,
 22 no, I would not know. Only from that Fox --

23 Q. And do you know the basis of the denial?

24 A. I'm sorry, I don't even know that there
 25 was a denial, since I have not seen any record.

1 Horan

2 Q. So I may be beating a dead horse here,
 3 but if there was a request and if there was a
 4 denial it's fair to say that Bourne doesn't know
 5 the basis for the denial?

6 A. Well, I'm -- yeah, I guess that would be
 7 right.

8 Q. When did you first become involved in
 9 this matter?

10 A. In approximately March of 2007.

11 Q. And what was your involvement?

12 A. When we learned of the use, my first
 13 involvement was I viewed it on YouTube and was
 14 asked for my comments by the owner.

15 Q. And how did you first learn of its use?

16 A. One of the employees advised us that
 17 they had seen it on television, on YouTube, and
 18 that's when we began looking into it.

19 Q. And you said that was in March 2007?

20 A. That's correct.

21 Q. How do you know the date?

22 A. How do I know the date?

23 Q. Mm hmm.

24 MR. FAKLER: Objection to form,
 25 misstates his former testimony.

1 Horan

2 A. That is my recollection of the time it
 3 happened. It was in March. I can't tell you
 4 exactly.

5 Q. Let me clarify the question.

6 Are there any documents that you know of
 7 that reflect the fact that Bourne made this use in
 8 March 2007?

9 A. Not that I'm aware of.

10 Q. Well, what was the name of the employee
 11 who brought this to your attention?

12 A. Jonathan Stone.

13 Q. Okay. What did you do following this
 14 being brought to your attention?

15 A. We first checked our computer files, and
 16 then our hard copy files, to find if we had in fact
 17 issued a license, since we knew that it had been
 18 originally run prior to 2007, to see if we had in
 19 fact, someone had in fact issued a license.

20 And then we did some checking to see, we
 21 went on the Internet to check to see, to verify the
 22 fact that it had been run and so on, and we had
 23 discussions in the office about what action we
 24 should take, and we consulted our attorney.

25 Q. Without telling me what your discussions

1 Horan
 2 knowledge.

3 MR. ZAVIN: And just again for
 4 clarification of the record, that letter is
 5 Bates stamped Bourne 0001 through 0002.

6 Q. Mr. Horan, can you explain to me why,
 7 having discovered this in March of 2007, Bourne
 8 made no claim or didn't bring this to the attention
 9 of Fox until June 21st, 2007.

10 A. As I said, we were researching to make
 11 sure that we in fact had not issued any licenses or
 12 had not received any kind of requests for licenses,
 13 and discussed possible actions to take directly,
 14 and we decided at that point that we would consult
 15 Mr. Levy.

16 Q. Prior to March 2007 had anyone
 17 communicated any complaint to Bourne with respect
 18 to this use of "When You Wish Upon A Star?"

19 A. No.

20 Q. Had any licensee or potential licensee
 21 of "When You Wish Upon A Star" communicated any
 22 complaint or brought this use to the attention of
 23 Bourne?

24 A. No.

25 Q. Had any licensee prior to March 2007

1 Horan
 2 Fox in "Family Guy?"

3 A. The decision was made because as a music
 4 publisher we have a right and an obligation to
 5 protect our copyrights, and we felt that this use
 6 was an invalid use, was an unlicensed use, and
 7 therefore we had a right and an obligation to make
 8 a claim.

9 Q. Was that the sole reason?

10 A. Yes.

11 (Horan Exhibit 3, Complaint and Jury
 12 Demand, marked for identification.)

13 Q. From 1999 to the present, when you were
 14 doing your second stint at Bourne --

15 A. Yes?

16 Q. -- do you know how many copyright suits
 17 Bourne commenced to protect its copyrights?

18 MR. FAKLER: Object on the ground it's
 19 outside the scope of the 30(b)(6) notice.

20 MR. ZAVIN: Objection is noted.

21 A. I know specifically of two that did not
 22 go to trial, that complaints were made for invalid
 23 use of Bourne copyright songs.

24 Q. Do you know what songs were involved?

25 A. Yes.

1 Horan

2 said they weren't going to license "When You Wish
 3 Upon A Star" because of the use in "Family Guy?"

4 A. No.

5 Q. Has Bourne ever granted a license to
 6 parody "When You Wish Upon A Star?"

7 A. No.

8 Q. Is that -- has anyone ever asked for a
 9 license to parody "When You Wish Upon A Star?"

10 A. Not to my knowledge.

11 Q. But it's fair to say you don't know
 12 whether the request that Fox made was to parody
 13 "When You Wish Upon A Star?"

14 A. I'm sorry, but I don't, I don't know
 15 that, I never saw the original request from Fox, so
 16 I don't know what it says.

17 Q. Right, and Bourne doesn't know what it
 18 says?

19 A. Right, so we can't say that, I can't say
 20 that, if, that Fox was the first one. I cannot say
 21 that.

22 Q. But you just don't know either way?

23 A. Either way, correct.

24 Q. Why was the decision made to make a
 25 claim against Fox with respect to this, the use by

1 Horan

2 Q. Which songs were they?

3 A. One was "Whistle While You Work," and
 4 one was "Hi Ho." The other was "Hi Ho."

5 Q. Who were these claims made against?

6 A. "Whistle While You Work" was made
 7 against the Ying Yang Twins and their record
 8 company, the name of which I cannot remember, and
 9 the other was, the other suit was against Alfred
 10 Publishing.

11 Q. Were uses made of either of these songs
 12 claimed to be parodies?

13 A. No.

14 Q. Do you know what market substitution is?

15 A. Yes.

16 Q. In your view, what is market
 17 substitution?

18 A. In the case of in the music industry,
 19 the use of one song for another song or a similar
 20 song, substituting one song for another, for
 21 whatever use is being made.

22 Q. So that is it fair to say a potential
 23 licensee, you know, wants song A, but instead of
 24 using song A it uses song B?

25 A. That's correct.

1 Horan

2 Q. Does Bourne have evidence of "I Needed
 3 You" substituting in the market for "When You Wish
 4 Upon A Star?"

5 A. Well, we have the immediate evidence
 6 that we don't have a synchronization license or fee
 7 for the use on "Family Guy." Nor do we have
 8 performance income from that use, but then also, as
 9 stated in Ms. Siroka's report, we don't always,
 10 people don't tell us why they don't use a song, but
 11 these things do affect a potential user's decision
 12 to use the song.

13 Q. Let me clarify the question.

14 Does Bourne have any evidence that any
 15 potential licensor, putting Fox aside for the
 16 moment, that "Family Guy" any other potential user
 17 or licensor or purchaser of songs has chosen to
 18 purchase "I Needed You" instead of purchasing or
 19 licensing "When You Wish Upon A Star?"

20 A. No, we do not.

21 (Horan Exhibit 4, Responses to
 22 Defendant's First Request for Admissions,
 23 marked for identification.)

24 Q. I'm showing you a document that's been
 25 marked as Exhibit 4, which I will represent to you

1 Horan

2 A. In my opinion, no.
 3 Q. So could you explain to me the basis for
 4 the denial of request for admission number 11,
 5 which states, "Admit that," quote, "I Needed
 6 You," end quote, "cannot serve as a substitute in
 7 the market for the song."

8 A. Again, I, I don't know that -- we don't,
 9 Bourne Company doesn't know that somebody, what
 10 somebody could do, so therefore we deny it. We
 11 can't say specifically that it cannot serve as a
 12 substitute in the marketplace for the song.

13 Q. But it's your opinion that it cannot? I
 14 think you just testified to that.

15 MR. FAKLER: Objection, asking for a lay
 16 opinion.

17 A. Again, my personal opinion is that it
 18 cannot.

19 Q. And then let's go to request for
 20 admission number 12, which says, "Admit that
 21 plaintiff," or Bourne, "is not aware of any
 22 instances where a consumer or other potential user
 23 or licensee of this song has purchased, used or
 24 licensed 'I Needed You' instead of the song."

25 What is the basis of the denial of that

1 Horan

2 is the responses to requests for admissions that we
 3 received from Bourne, and the first question is, do
 4 you recognize it?

5 A. Yes.

6 Q. You've seen it before?

7 A. Yes, I have.

8 Q. Did you participate in its preparation?

9 A. Yes, I did.

10 Q. Okay, could you tell me the basis of the
 11 denial for request for admission number 10 on
 12 page 5, and just so the record is clear, the
 13 request for admission reads, "Admit that," quote,
 14 "I Needed You," end quote, "has not served as a
 15 substitute in the market for the song," the song
 16 being "When You Wish Upon A Star," and what is the
 17 basis for the denial of that request for admission?

18 A. Because we were not aware of any use
 19 does not necessarily mean to us that it has not
 20 been used.

21 Q. In your opinion, would any licensor who
 22 wants to use "When You Wish Upon A Star" think that
 23 "I Needed You" is an acceptable substitute?

24 MR. FAKLER: Objection to the request
 25 for an opinion, a lay opinion.

1 Horan

2 request for admission?

3 A. Again, we are not aware of any, but we
 4 don't know, so we can't admit that, we cannot say
 5 that there is an instance or not.

6 Q. Mr. Horan, I suggest that you read that
 7 request for admission carefully, because I believe
 8 that it asks, admit that you are not aware of any
 9 instances of substitution, and yet you denied that,
 10 which is denying -- it implies to me that you are
 11 aware of instances of market substitution.

12 Can you explain to me what the basis of
 13 the denial for that request for admission was.

14 A. No, I cannot in that case.

15 Q. Do you agree with me that Bourne does,
 16 is not aware of any instance where a consumer or
 17 other potential user or licensee of the song has
 18 purchased, used or licensed "I Needed You" instead
 19 of the song?

20 MR. FAKLER: Objection, misstates his
 21 prior testimony.

22 MR. ZAVIN: I, I was asking him whether
 23 he agreed with that statement.

24 Q. You can answer the question.

25 A. Would you repeat the question.

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1 Horan

2 Q. Are you aware that the song was used in,
 3 starting in, publicly in November 2003 on "Family
 4 Guy," that it was both broadcast and distributed on
 5 DVD since November of 2003?

6 A. We are now aware of that fact, yes.

7 Q. And were you aware of that fact in
 8 October 2007 when you filed this complaint?

9 A. Yes, we were.

10 Q. Do you have any evidence that between
 11 October -- I'm sorry -- between November 2003 and
 12 October 2007 that the existence of "I Needed You"
 13 as performed on "Family Guy" harmed the market for
 14 "When You Wish Upon A Star?"

15 A. Again, it -- other than "Family Guy,"
 16 the synching and the fees that we should have
 17 gotten from, we feel we should have gotten from
 18 "Family Guy," we don't, but, as pointed out in
 19 Ms. Siroka's report and from my experience, that
 20 people do -- we would never know if people don't
 21 use our song for whatever reason.

22 They don't come to us and say, we're not
 23 going to use this song because of this or that. We
 24 don't know that, but it's --

25 Q. Have you made any effort --

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1 Horan

2 MR. ZAVIN: Let's mark this as
 3 Defendants' Exhibit 5.

4 (Horan Exhibit 5, List of Licenses,
 5 marked for identification.)

6 Q. Showing you a document that's been
 7 marked as Defendants' Exhibit 5 which was produced
 8 to us by Bourne, it's Bates stamped 0145 through
 9 0147. Do you recognize this document?

10 A. Yes, I do.

11 Q. What is it?

12 A. It's a listing of licenses that have
 13 been issued for "When You Wish Upon A Star" in 2003
 14 through 2008.

15 Q. Okay. I haven't added them up, and, you
 16 know, we can certainly do it, but it appears to me
 17 that maybe a third of the licenses or 25 percent of
 18 all of these licenses are to Disney. I mean, it is
 19 what it is. I'm not trying to --

20 A. Oh, okay.

21 Q. -- trick you into giving, agreeing with
 22 a false number, but it is, certainly a substantial
 23 number of the licenses appear to be with Disney.

24 Do you agree with that?

25 MR. FAKLER: Objection to form, vague as

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1 Horan

2 MR. FAKLER: Can he finish his answer.

1 Horan

2 to "substantial."

3 A. Yes, I'll agree with that.

4 Q. And do you have any reason to think that
 5 Disney's licensing of the song has diminished
 6 because of "I Needed You?"

7 A. I don't think so, but they're -- the
 8 reason that the main license we do with Disney is
 9 the recurring, What's Next, Super Bowl, World
 10 Series spots that they do, and that -- so it's a
 11 repeat of basically the same use in most of these
 12 cases.

13 Q. But their use of the song hasn't
 14 diminished, then?

15 A. No.

16 Q. Okay. Now, let me ask a question.

17 In preparing for this deposition did you
 18 look to see whether the number of licenses granted
 19 from 2003 to 2007 or '08, the present, was
 20 substantially less per year than the number of
 21 licenses granted prior to 2003?

22 MR. FAKLER: I'm sorry, Jonathan, did
 23 you ask about a particular type of licenses?

24 MR. ZAVIN: For "When You Wish Upon A
 25 Star."

10 (Pages 34 to 37)

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<p>1 Horan 2 MR. FAKLER: For synchronization 3 licenses? 4 MR. ZAVIN: All types of licenses. 5 MR. FAKLER: I'm going to object to the 6 extent you're asking about other than 7 synchronization licenses, the audiovisual 8 rights, it's outside the scope of the 9 30(b)(6). 10 A. And we didn't -- would you repeat the 11 question. 12 (Record read.) 13 A. No, we did not. 14 Q. In the document request to Bourne we 15 requested -- I'll paraphrase it -- "All documents 16 evidencing harm in the market substitution or harm 17 to 'When You Wish Upon A Star.'" To the best of my 18 knowledge, we haven't received any such documents. 19 Do you know whether there are any 20 documents that Bourne has evidencing any harm of 21 any kind to "When You Wish Upon A Star" because of 22 "I Needed You?" 23 A. No. I do not know of any such 24 documents. 25 Q. Other than your opinion, your personal</p>	<p>1 Horan 2 Q. As a matter of fact, page -- in Bourne's 3 complaint in this action, in paragraph 21 Bourne 4 asserts, and I quote, "When You Wish Upon A Star" 5 has only grown in popularity since it was 6 introduced in 1940." 7 Do you see that in the complaint? 8 A. Yes, I do. 9 Q. Is that a true statement? 10 A. Yes, it is. 11 Q. And popularity has not been diminishing 12 since 2003, has it? 13 A. We have no evidence of that fact, no. 14 Q. Bourne has in this lawsuit given as a, 15 or has produced to defendants the expert report of 16 Sandy Wilbur. Are you aware of that? 17 A. Yes, I am. 18 Q. Do you know when Sandy Wilbur was 19 retained by Bourne or Bourne's attorneys on 20 Bourne's behalf? 21 A. I do not know that exact date or the 22 approximate date, no. 23 Q. Well, was it within the last month or 24 two? 25 A. As far as I know, yes.</p>
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<p>1 Horan 2 opinion, and Ms. Siroka's opinion, for whatever 3 it's worth, does Bourne have any evidence 4 whatsoever that it has been irreparably harmed 5 by -- or the market for "When You Wish Upon A Star" 6 has been irreparably harmed by "I Needed You?" 7 MR. FAKLER: Objection to form to the 8 extent it calls for a legal conclusion. 9 Q. You can answer. 10 A. No, we do not. 11 Q. Do you have any reason to believe that 12 the number of licenses and license requests from 13 2003 through to 2007 has diminished compared to the 14 period before 2003? 15 MR. FAKLER: Objection to the extent it 16 calls for testimony other than synchronization 17 licenses. 18 MR. ZAVIN: Okay. 19 Q. Let's restrict it to synchronization 20 licenses for the moment. 21 Do you have any reason to believe that 22 the number of synchronization licenses granted or 23 the requests for synchronization licenses has 24 diminished from 2003 to 2007? 25 A. No.</p>	<p>1 Horan 2 Q. Let me ask specifically, was it prior to 3 October 3rd, 2007? 4 MR. FAKLER: Objection. This again is 5 outside the scope of 30(b)(6). He's just said 6 they, the company was not involved in her 7 retention; he's speaking solely based on 8 personal recollection, if he knows at all. 9 Q. Okay, if you know. 10 A. As far as I know, no. 11 Q. I'm sorry, I don't -- I've lost track of 12 what the "no" means. 13 A. You had asked if it was prior to 14 October. 15 Q. Right. 16 A. And I said, no, as far as I know, it was 17 not. 18 Q. Did Bourne seek, prior to bringing this 19 litigation did Bourne seek the advice of any 20 musicologist with respect to how similar or 21 dissimilar "When You Wish Upon A Star" was from the 22 song "I Needed You?" 23 A. Yes, we did. We have an in-house editor 24 who works for one of our subsidiaries, 25 International Music Company, and he did an analysis</p>

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1 Horan
 2 this on the grounds that it's outside the
 3 scope of the 30(b)(6) notice.

4 MR. ZAVIN: Well, it isn't.

5 MR. FAKLER: How is it within, how is
 6 the public association of Walt Disney on this
 7 notice? Can you show it to me.

8 DI Q. Mr. Horan, did you ever watch in the
 9 1950s the television program "The Wonderful World
 10 Of Disney?"

11 MR. FAKLER: I'm going to instruct the
 12 witness not to answer. This is way outside of
 13 anything on this list.

14 Q. Mr. Horan, are you following the
 15 instruction of your counsel?

16 A. Yes, I am.

17 MR. ZAVIN: I have no further questions.

18 MR. FAKLER: Can we take 10.

19 MR. ZAVIN: Sure.

20 MR. FAKLER: Thanks.

21 (Recess taken.)

22 MR. FAKLER: First I'd just on the
 23 record like to request that Mr. Horan have the
 24 opportunity to review and correct any final
 25 transcript of the deposition.

1 Horan
 2 in 1998, until 2005 in fact, the only person who
 3 would have denied or handled a telephone call
 4 requesting a use would have been Beebe Bourne, who
 5 has since passed away, B-E-E-B-E Bourne, who died
 6 in 2005.

7 MR. FAKLER: That's all I have.

8 MR. ZAVIN: Okay, just very simple.

9 EXAMINATION BY MR. ZAVIN:

10 Q. I just -- I understand that Beebe Bourne
 11 died, but your answer remains correct that Bourne
 12 as a company does not have any record of the
 13 request, a request coming in or what the nature of
 14 the request was or why it was denied if it was
 15 denied; is that correct?

16 A. That is correct.

17 Q. Okay. And just with respect to your
 18 first clarification, is it, does the rest of your
 19 answer remain the same, that you, other than the
 20 loss of whatever revenue that they might have
 21 expected to receive by Fox from the use, Bourne has
 22 no evidence of market harm or market substitution?

23 A. That is correct.

24 MR. ZAVIN: Okay, I have no further
 25 questions, except I reserve the right to

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1 Horan

2 MR. ZAVIN: Agreed.

3 MR. FAKLER: And so -- thanks, and I
 4 have just a little bit of cross here, so to
 5 speak.

6 EXAMINATION BY MR. FAKLER:

7 Q. Mr. Horan, having answered a series of
 8 questions, is there anything in your testimony that
 9 you feel the need, looking back on it, to amplify
 10 or clarify?

11 A. Yeah, there were a couple of questions
 12 regarding market substitution and harm to the
 13 market. In a couple of instances I gave an answer
 14 of, if asked if there was any harm I said -- and I
 15 guess just an answer -- no, but in those instances
 16 I should, should have said that, brought up the
 17 loss of revenue from the "Family Guy" use that does
 18 affect Bourne Company.

19 And then there was also a question about
 20 the, whether or not I was aware of whether or not
 21 the, a request from Fox had come in for the use,
 22 and I said I was not aware whether or not it came
 23 in or what was, whether it was denied or how it was
 24 denied.

25 That should be clarified to state that

1 Horan
 2 reopen this should the court move favorably,
 3 that the witness was improperly instructed not
 4 to answer certain questions or certain lines
 5 of questions.

6 (Time noted: 11:45 a.m.)

7
 8
 9 JEREMIAH HORAN
 10

11 Sworn and subscribed to
 12 before me this _____ day
 13 of _____ 2008.

14
 15
 16 NOTARY PUBLIC
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1 CERTIFICATE

2 STATE OF NEW YORK)
3) Ss
4 COUNTY OF NEW YORK)5 I, JAMES W. JOHNSON, a Registered
6 Professional Reporter and Notary Public within
7 and for the State of New York, do hereby
8 certify:9 That JEREMIAH HORAN, the witness whose
10 deposition is hereinbefore set forth, was duly
11 sworn by me and that such deposition is a true
12 record of the testimony given by such witness.13 I further certify that I am not related
14 to any of the parties to this action by blood
15 or marriage and that I am in no way interested
16 in the outcome of this matter.17 IN WITNESS WHEREOF I have hereunto set
18 my hand this 2nd day of March 2008.19
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25
JAMES W. JOHNSON
Registration #01J05000925
Commission Expires 9/4/2010

1 ERRATA SHEET

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3 DATE OF DEPOSITION: Friday, February 29, 2008
4 WITNESS: Jeremiah Horan

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JEREMIAH HORAN

Witness and sworn to before me
this ____ day of _____, 2008.

(Notary Public) My Commission Expires:

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